Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1189

STATE OF MARYLAND,

Petitioner,

v.

JOHN EDWARD DOWNS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Supreme Court of the United States

OCTOBER TERM, 1976

No.

STATE OF MARYLAND,

Petitioner,

v.

JOHN EDWARD DOWNS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF THE CASE

The Respondent, John Edward Downs, was convicted by a jury in the Circuit Court for St. Mary's County, Maryland, of disorderly conduct, resisting arrest and assault and battery. As a result of these convictions, the Respondent was sentenced on March 26, 1975 to a term of 60 days in the St. Mary's County Jail and two concurrent three year terms under the jurisdiction of the Division of Correction. The sentences were altered by a sentence review panel and the Respondent was resentenced to 60 days, three years and three years respectively under the jurisdiction of the Division of Correction. The sentences were made concurrent, were suspended, and the Respondent was placed on probation for an indeterminate period. All convictions were affirmed by the Court of Special Appeals of Maryland

in an opinion filed on February 3, 1976. On writ of certiorari the Court of Appeals of Maryland reversed the Respondent's conviction on November 30, 1976. It is this judgment of the Court of Appeals of Maryland upon which review is sought by this Petition for Writ of Certiorari.

OPINIONS BELOW

Downs v. State, 30 Md. App. 253 (1976), Court of Special Appeals of Maryland; *Downs v. State,* 278 Md. 610 (1976), Court of Appeals of Maryland.

GROUNDS FOR ISSUANCE OF WRIT

The writ of certiorari in the instant case is sought pursuant to the provisions of Title 28, Section 1257(3) and the provisions of Rule 19(1)(a), Supreme Court Rules, on the grounds that the Court of Appeals of Maryland has decided a federal question under the United States Constitution in a manner not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED

Did the Court of Appeals of Maryland err in holding that the Respondent's comment "the fucking niggers in this county are no better than god damned policemen" spoken in a loud voice or "yelled" in a restaurant filled with a racially mixed crowd were not the kind of personally abusive epithets which fall outside of the protection of the First Amendment under the rubric of fighting words and, therefore, were protected speech?

STATUTORY AND CONSTITUTIONAL PROVISIONS APPLICABLE

Constitution of the United States, Amendment One:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Maryland Code, Article 27, Section 123(c) (1976 Replacement Volume):

> "No person shall act in a disorderly manner to the disturbance of the public peace, upon any public street, highway, alley, park or parking lot, or in any vehicle that is in or upon any street, highway, alley, park or parking lot, in any city, town or county in this state, or at any place of public worship, or public resort or amusement in any city, town or county of this state, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units in any city, town or county of this state."

STATEMENT OF FACTS

In lieu of a record in the Court of Appeals of Maryland the parties agreed to submit the case to that tribunal upon a statement of facts pursuant to the provisions of Rule 828(g) of the Maryland Rules of Procedure. Accordingly that statement of facts is set out herein as follows:

Trooper George W. Taylor of the Maryland State Police testified that on December 8, 1974, at about 3:30 a.m. he was on duty in uniform and went to the Galley Restaurant in Lexington Park, Maryland, to meet a complaining witness. Upon learning that the witness was not present, he decided to have breakfast while waiting for the witness to appear.

According to the trooper, the restaurant was crowded. All but three or four of the twenty stools at the counter were occupied, as were all the tables and booths. He estimated that there were from thirty-five to forty persons in the restaurant and that the patrons

were "mostly white, I'd say approximately 90 percent." Trooper Taylor described the noise level in the room as "nothing anything close to quiet; it was like a humming like you would normally hear in a restaurant that was pretty well packed." He said, "all the talking blended with the exception of Mr. Downs: which was well above anybody's or anyone else's tone."

The trooper gave the following account of the incidents which led to Appellant's arrest:

> "I sat down at the table in the front of the Galley and ordered, and while I was waiting for my breakfast to arrive as well as the complainant who I was waiting for, I noticed Mr. Downs, the Defendant, seated there in the first booth which was immediately adjacent to the table I was sitting at. I heard him talking referring to police officers. He was talking in a moderate to above normal tone referring to 'All the goddamn policemen in this county are no fucking good, they're just after me. They always got to jump me and beat on me.'
>
> "I let this go on for approximately two to three minutes, not saying anything. I felt that Mr. Downs would soon tire of making comments which I was a police officer and it was certainly directed towards me."
>
> "After two, three, four minutes of this above-normal tone he at this point began talking louder and it was at the point of yelling, and he not only was at this time talking about GD policemen and picking on him and beatin up on him, so forth, he started talking about the fucking niggers in this County are no better than goddamn policemen. And at this time there happened to be two black females in the age vicinity of eighteen to twenty years sitting at the counter which was across from his booth approximately four feet away. I was in the vicinity of eight feet from Mr. Downs, and being able to hear the loud yelling type of talking, I was certain that . . ."

> "At this point I stood up and calmly advised Mr. Downs that he would have to refrain from the profanity and tone down his tone of speaking, and that it was disruptive, and at this time he stated to me, 'Well, who in the fuck said anything to you, anyway. You're not in this goddamn conversation.' And I returned from that remark with Mr. Downs, 'If you do not refrain from your yelling and your profane language, I'm going to have to place you under arrest.'
>
> "He said, 'You ain't bad enough to place me under arrest.' So, I walked around to his booth. I saw the crutches[1] leaning up against the table. I reached in and I grabbed hold of his right arm and advised Mr. Downs, 'Sir, you are under arrest for disturbing the peace, disorderly conduct.'"

Trooper Taylor stated that when he grabbed Appellant's arm, Appellant "wrenched it" away and struck the officer across the arm and chest. Taylor then grabbed him with both hands, put him on the floor and, although the Appellant was struggling and trying to get away, managed to handcuff him.

According to Trooper Taylor, Appellant was sitting in a booth approximately eight feet from where he was sitting, and was facing in his direction. There was a young woman seated on Appellant's left and another couple seated directly across the table from Appellant in the booth.

Trooper Taylor stated that when he first heard Appellant speaking, it caught his ear and caused him to turn and look toward Appellant. He testified that he had not seen whether the first remarks which he heard Appellant make were spoken to Appellant's companions in the booth or directed at him. He stated that he felt that Appellant was directing the comments at him. Asked whether he felt "hurt" by the remarks, Trooper

[1] Appellant testified that he had recently had a cast removed from his ankle and was using crutches.

Taylor replied that "I was curious enough to look in that direction."

Trooper Taylor was the only witness called by the State during its case in chief. After his testimony Appellant moved for judgment of acquittal. The motion was denied.

Three witnesses testified for the defense. These were an employee of the restaurant, one of Appellant's companions in the booth, and Appellant himself.

Mrs. Frances Tattersall was called first and was asked:

> "Q. And on the evening of the 12th of December, 1974, (sic) were you at the Galley?"
>
> "A. I was working in the Galley at the time."

She was working as a cook behind the counter and during that evening and early morning many of the patrons were using vulgar and profane language. She stated that she did not know whether any of this language came from Appellant. Asked what she had heard Appellant say, she replied:

> "Well, I didn't hear too much conversation going on with anybody in there, but I heard a loud, some loud talking and I looked around and the officer told Mr. Downs he was, "You are under arrest." And I turned back and was working at the grill and at the refrigerator, and the next thing I noticed about anything was that I just heard a scuffle of noise and I turned and looked and Mr. Downs was down between the two stools and he had gotten hold of his hairpiece and he dropped it on the floor, and the next thing I heard, he was, they were going out the door, he had him handcuffed, under arrest, and they were going out the door."

Sarah Lucille Lynn testified that she was seated next to Appellant in the booth on the morning of December 8, 1974. She said she heard Appellant use the profanity described by the trooper but could not recall his exact

words. She said he did not direct any comments to anyone other than those seated in the booth. She also stated that everyone in the restaurant was speaking loudly and that Appellant was no louder than anyone else.

Appellant testified that he was a 32 year-old musician and had gone to the Galley to have breakfast after leaving work. He admitted to having a loud conversation and to using profane language but said he was speaking only to his companions and did not direct any remarks toward Officer Taylor or anyone else outside his booth. He did not deny using the words "fucking police officer" but said they were not used in reference to Trooper Taylor. He did, however, deny using the term "fucking niggers." He said at that time of the morning several others in the restaurant were also using vulgar and profane language. In addition, Appellant admitted, on cross-examination, to having in his possession that morning a newspaper article which said:

> "LAW AND ORDER
>
> You can call your local cop a MOTHER (fornication expletive deleted) PIG or any other name and there is NOT A THING he can do to you LEGALLY, not even tell you to shut up. . . . The U.S. Supreme Court has said so INDIRECTLY by refusing to back Arkansas in a recent COP BADMOUTH case. . . ."

The State called, as a rebuttal witness, Thomas Farrell, a computer operator who was seated in one of the booths having breakfast at the time of Appellant's arrest.

He described the events which he observed as follows:

> "I was in the Galley eating breakfast after I got off work, and there was quite a disturbance at the front of the Galley. I turned around to see what was going on and I noticed the patrolman was standing there by the booth where the Defendant

was sitting. I didn't hear any of the conversation at all, because it was pretty noisy in there, but there was quite a disturbance, so I turned around, saw the officer standing there.

"Then the Officer sat down at his table and then it seemed like five, maybe ten minutes at most later the officer got back up and it was more disturbance. I saw him try to — apparently it was while he was arresting the Defendant, and it turned out to be quite a scuffle where it looked like the Defendant was trying to get away, and the patrolman put him down on the floor and put a handcuff on him and then stood him upright."

When asked to describe the general noise level in the Galley at this time, he said "it gets pretty noisy in there, generally speaking, but no more so than any busy restaurant." He said the noise of the disturbance he heard was "quite a bit louder," and that "There was obviously one person speaking very loud. I didn't see who was speaking because I had my back to it."

Appellant's motion for judgment of acquittal was renewed and denied at the conclusion of all the evidence.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE COURT OF APPEALS OF MARYLAND DID ERR IN HOLDING THAT THE RESPONDENT'S COMMENT "THE FUCKING NIGGERS IN THIS COUNTY ARE NO BETTER THAN GOD DAMNED POLICEMEN" SPOKEN IN A LOUD VOICE OR "YELLED" IN A RESTAURANT FILLED WITH A RACIALLY MIXED CROWD WERE NOT THE KIND OF PERSONALLY ABUSIVE EPITHETS WHICH FALL OUTSIDE OF THE PROTECTION OF THE FIRST AMENDMENT UNDER THE RUBRIC OF FIGHTING WORDS AND, THEREFORE, WERE PROTECTED SPEECH.

The Court of Appeals of Maryland in reversing the Respondent's conviction for disorderly conduct concluded that a statement by the Respondent in a crowded, racially mixed restaurant that the fucking

niggers in the county were no better than god damned policemen was not the kind of personally abusive epithet which falls outside of the protection of the First Amendment and that, therefore, the Respondent was engaged in a protected speech, 278 Md. 610 at 618. The Court concluded that the remark made by the Respondent was during a conversation with friends, that there was no direct evidence that the statement was spoken to anyone other than the person sitting in the booth with the Respondent, and that there was no evidence, besides that of a State Trooper, that anyone else heard the statement. Lastly the Court stated that even if someone had in fact heard the statement, there was no evidence that that person was offended by it and that further even if someone had been offended by the statement there was no evidence that any person was so aroused as to respond in a violent manner. 278 Md. at 618.

The question raised by this petition is whether or not the Court of Appeals of Maryland erroneously expanded this Court's interpretation of protected speech in holding that under the facts in this case the Respondent was engaged in a protected activity.

The cases relied upon by the Court of Appeals of Maryland in reversing the Respondent's conviction essentially deal with the facial invalidity of so-called disorderly conduct statutes. See *Gooding v. Wilson,* 405 U.S. 518, 92 S. Ct. 1103 (1972); *Rosenfeld v. New Jersey,* 408 U.S. 901, 92 S. Ct. 2479 (1972); *Brown v. Oklahoma,* 408 U.S. 914, 92 S. Ct. 2507 (1972); *Lucas v. Arkansas,* 416 U.S. 919, 94 S. Ct. 1917 (1974); and *Kelly v. Ohio,* 416 U.S. 923, 94 S. Ct. 1922 (1974). The short answer to the Court of Appeals of Maryland position is that its reliance in its opinion on these decisions as a guide for interpreting *Chaplinsky v. New Hampshire,* 350 U.S. 568, 62 S. Ct. 766 (1942), *Lewis v. New Orleans,* 415 U.S. 130, 94 S. Ct. 790 (1974), and *Gooding, supra,* is

somewhat misplaced. For example, on remand, the Supreme Court of Arkansas in *Lucas v. State* upheld its statute under the decision in *Lewis v. City of New Orleans, supra,* and upheld Lucas' conviction, 520 S.W.2d 324 (1975). This Court dismissed an appeal from that decision on the grounds of a want of a substantial federal question, ___ U.S. ___, 96 S. Ct. 17 (1975). In a similar case, *Karlan v. Cincinnati,* 416 U.S. 924, 94 S. Ct. 1922 (1974), the Supreme Court of Ohio specifically reaffirmed the constitutionality of its statute under *Lewis v. New Orleans, supra,* and therefore affirmed Karling's conviction, 314 N.E.2d 162 (1974).

In *Lewis v. City of New Orleans, supra,* this Court concluded that a Louisiana statute as construed by the Louisiana Supreme Court was overbroad and was, therefore, in violation of the First and Fourteenth Amendments and accordingly was facially invalid. Even though the Louisiana Supreme Court concluded that the statute in question prohibiting "wantonly cursing, reviling, and using obscene or opprobrious language" was narrowed to "fighting words" uttered to specific persons at a specific time, the court nonetheless concluded that the statute had a broader sweep than the constitutional definition of fighting words in *Chaplinsky v. New Hampshire, supra.* Thus *Lewis* was specifically reversed because of the breadth of the statute. In the instant case, however, the constitutionality of the statutory provision in question, Article 27, Section 123(c), Annotated Code of Maryland, (1976 Repl. Vol.) is not in question. In fact it is clear that the courts of Maryland, in interpreting what shall be an act in a disorderly manner, apply the standards of *Chaplinsky v. New Hampshire, supra,* and *Gooding v. Wilson,* 405 U.S. 518, 92 S. Ct. 1103 (1972). See *Reese v. State,* 17 Md. App. 73 (1973); *Downs v. State,* 30 Md. App. at 261, and *Downs v. State,* 278 Md. at pages 613 through 617.

Three factors should be considered as paramount in determining the constitutional validity of the Respondent's conviction in this case: (1) the Respondent made the statements in question in a fairly crowded restaurant with a racially mixed patronage; (2) the language itself was specifically a racial epithet in character; and (3) it was obvious that at the very least the Respondent was baiting the police officer for his reaction. The record discloses that Maryland State Trooper Taylor was approximately eight feet from the Appellant at the time he spoke the epithets in a "loud yelling type of talking" and the epithets were made in the presence of at least two black females, aged 18 to 20 years, who were sitting at a counter across from the Respondent's booth, approximately four feet away. There is no question but that the black persons heard the racial epithet, which was delivered after the Respondent had already stated openly "all the god damned policemen in this county are no fucking good, they're just after me. They always got to jump me and beat on me." With regard to whether or not the statements in the instant case are fighting words, one thing is clear, the term "fucking niggers" can certainly not be interpreted as meaning anything other than a patently derisive and inflammatory slur. In fact Webster's New Universal Dictionary of the english language, Unabridged (1976) defines "nigger" as:

> "1. A Negro."
>
> "2. A member of any dark skinned people. A vulgar, offensive term of hostility and contempt, as used by Negrophobes."

Thus not only is the term "Nigger" vulgar but it is also offensive and calculated to instill hostility. Compare Mr. Justice Powell's concurring opinion in *Brown v. Oklahoma, supra,* 92 S. Ct. at 2508. Lastly there is no question but that the Respondent was willfully using scurrilous language in a calculated attempt to offend

both Trooper Taylor and also the black people sitting near him. In fact it is apparent that he was attempting to force some type of official response from the police officer as demonstrated by the colloquy at his table with the Trooper and also as demonstrated by the newspaper article found in the Respondent's possession at the time of his arrest. Perhaps the circumstances surrounding this case are best summed up by the dissenting opinion authored by Mr. Justice Powell in *Rosenfeld v. New Jersey* wherein it is stated at 92 S. Ct. 2481:

> "Perhaps Appellant's language did not constitute 'fighting words' within the meaning of *Chaplinsky*. While most of those attending the school board meeting were undoubtedly outraged and offended, the good taste and restraint of such an audience may have made it unlikely that physical violence would result. Moreover, the offensive words were not directed at a specific individual. But the exception to the First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." See also *Williams v. District of Columbia,* 136 U.S. App. D.C. 56, 419 F.2d 638 (1969).

Furthermore as Chief Justice Burger stated in his dissent to *Rosenfeld v. New Jersey* at 92 S. Ct. 294:

> "When we undermine the general belief that the law will give protection against fighting words and profane and abusive language such as the utterances involved in these cases, we take steps to return to the law of the jungle. These three cases, like *Gooding,* are small but symptomatic steps. If continued, this permissiveness will tend further to erode public confidence in the law — that settled but indispensible ingredient of order to liberty.
>
> "In Rosenfeld's case, for example, civilized people attending such a meeting with wives and children would not likely have an instantaneous, violent response, but it does not unduly tax the imagination to think that some justifiably outraged parent whose family were exposed to the foul mouthings of the speaker would 'meet him outside' and either alone or with others, resort to the nineteenth century's vigorous modes of dealing with such people. I cannot see these holdings as an 'advance' in human liberty but rather a retrogression to what men have struggled to escape for a long time."

Within the specific context of the instant case see specifically the dissenting opinion of Justice Powell joined by the Chief Justice and Mr. Justice Blackmun in *Rosenfeld v. New Jersey,* 408 U.S. 901, 92 S. Ct. 2479 (1972) and the dissent of Mr. Chief Justice Burger, joined by Mr. Justice Blackmun and Mr. Justice Rhenquist at 408 U.S. 901, 92 S. Ct. 2483 and 408 U.S. 903, 92 S. Ct. 2484 (1972). Compare the concurring opinion of Mr. Justice Powell in *Brown v. Oklahoma,* 408 U.S. 914, 92 S. Ct. 2507 (1972). Thus it is clear that although *Chaplinsky, supra, Gooding, supra,* and *Lewis, supra,* stand for the proposition that the constitutional guarantees of freedom of speech forbid the states to punish the use of words or language not within narrowly limited classes of speech, the class of speech in the instant case is outside that definition.

Under the facts in this case the negro patrons of that restaurant in St. Mary's County, Maryland were the subjects of public obloquy. Furthermore the Respondent's commentary specifically invited lawless conduct on the part of the patrons if they objected to his statements, a circumstance which the jury in this case could have inferred was the express intent of the Respondent. Rather than fight, the negro patrons of the restaurant were given two other choices, being forced to sit in silence and take the verbal assaults or get up and leave. It is apparent that in the context delivered by no

stretch of the imagination were the Respondent's comments protected speech. The statements were obviously not political statements announced for the purpose of converting the listener to the views of the speaker nor were they given under such circumstances as where the public would be advised, or have some advance idea, of the nature of the comments which might be expected. (compare Justice Powell's dissent in *Brown, supra,* also *Schneck v. United States,* 249 U.S. 47, 39 S. Ct. 247 (1919)). As Mr. Chief Justice Vinson stated for this Court in *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857 at 866:

> "Speech is not an absolute, above and beyond control by the Legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principal that there are no absolutes, that a name, a phrase, *a standard has meaning only when associated with the considerations which gave birth to the nomanclature.*" (Emphasis added).

In the instant case it is submitted that the State of Maryland has imposed a greater restriction as a matter of federal constitutional law than this Court's interpretations of the First Amendments require. *Oregon v. Hass,* 420 U.S. 714, 95 S. Ct. 1215 (1975); *Texas v. White,* 423 U.S. 67, 96 S. Ct. 304 (1975); *Smayda v. United States,* 352 F.2d 251 (9th Cir., 1975) *cert. denied,* 382 U.S. 981, 86 S. Ct. 555 (1966). Under the circumstances in this case, in order to arrest an individual, even upon probable cause, a police officer in Maryland must wait until an outbreak of violence ensues before an arrest can be made. Compare Court of Special Appeals opinion, 30 Md. App. at 261, 262.

CONCLUSION

The Petitioner respectfully submits in conclusion that the Court of Appeals of Maryland has erroneously overextended the protected speech doctrine embodied in *Gooding v. Wilson, supra,* and *Chaplinsky v. New Hampshire, supra,* to the detriment of the people of the State of Maryland. Wherefore, the Petitioners pray that this Honorable Court grant a writ of certiorari to the Court of Appeals of Maryland in the premises.

Respectfully submitted,

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I HEREBY CERTIFY that on this 28th day of February, 1977, a copy of the aforegoing was mailed to Dennis M. Henderson, Assistant Public Defender, 800 Equitable Building, Baltimore, Maryland 21202, Attorney for the Respondent.

BERNARD A. Raum,
Assistant Attorney General.

APPENDIX A

In The Court Of Special Appeals Of Maryland

No. 524

September Term, 1975

John Edward Downs
v.
State of Maryland

Gilbert, Menchine and Davidson, JJ.

(Filed February 3, 1976)

GILBERT J.:

The appellant, John Edward Downs, was convicted by a jury in the Circuit Court for St. Mary's County of disorderly conduct, resisting arrest, and assault and battery. Appellant was sentenced to terms of sixty days in the county jail and to two concurrent three-year sentences under the jurisdiction of the Division of Correction. A sentence review panel, convened pursuant to Md. Rule 762c2, altered the original sentences. The panel resentenced appellant to sixty days, three years and three years, respectively under the jurisdiction of the Division of Correction. All sentences were made concurrent and they were suspended. The appellant was placed on probation ". . . for an indeterminate period. . . ."[1]

[1] We made it clear that probation may not be for an indefinite period of time. *See* Laurie v. State, No. 359 Sept.

On appeal to this Court, appellant challenges the sufficiency of the evidence as to the disorderly conduct charge. He further complains of the trial judge's advisory jury instructions as they related to appellant's failure to obey a command of a police officer. We shall discuss the latter contention first.

Appellant recognizes that he failed to except to the trial judge's instructions, and, therefore, under Md. Rule 756g he may not now raise any question of error unless there was "plain error" in the instructions. Judge Powers, writing for this Court in *Brown v. State,* 14 Md. App. 415, 422, 287 A.2d 62, 65 (1972), *cert. denied* 265 Md. 736 (1972), explained "plain error."

> ". . . [A]s a general guide, we may say that under Rule 756g we will take cognizance of and correct an irremediable error of commission, but not an error of omission. Of course, the error must be plain, and material to the rights of the accused, and, even then, the exercise of our discretion to correct it should be limited to those cases in which correction is necessary to serve the ends of fundamental fairness and substantial justice."

The trial judge had instructed the jury that:

> ". . . If you find that the Government [sic] has proven beyond a reasonable doubt that the Defendant failed to obey a policeman's command to move on when not to do so may have endangered the public peace, you may find the Defendant guilty of the misdemeanor of disorderly conduct."

While the quoted instruction may be correct as a general principle of law, it was erroneous under the circumstances of this case because there was no evidence whatsoever of the appellant's being told to "move on". According to the arresting officer, Trooper Taylor of the Maryland State Police, the charge of disorderly conduct arose out of the appellant's indecorous remarks that "'. . . all the goddamn policemen in this County are no fucking good, they're just after me,'"

Term. 1975, C.S.A., filed January 2, 1976. *See also* Md. Ann. Code art. 27, §641A, wherein it is provided that probation may be ". . . for a period longer than the sentence but not in excess of five years."

supplemented by a further comment that "['] . . . the fucking niggers in this County are no better than goddamn policemen.[']" The trial judge's seemingly gratuitous charge about failing to obey a police officer's command to "move on" was made without benefit of any evidence to support it. It was an error of commission, but even so we do not believe that "fundamental fairness and substantial justice" require us to reverse the judgment. We so believe because we fail to see how appellant was prejudiced by the instruction. There was, as we have said, no evidence upon which the charge could be bottomed. The jury, having heard the testimony, was aware that the police officer never testified to ordering appellant to "move on". Appellant's movements were not ever in question. The matter was limited to appellant's verbalizing of tasteless remarks. Furthermore, we think that had appellant requested that the erroneous instruction be corrected, the trial judge would have readily done so. The belated recognition by the appellant of the superfluous instruction ". . . does not call for us to correct it now." *Brown v. State,* 14 Md. App. at 422. The standard dealing with "plain error" is set by Rule 756g. The recent decision of *Dorsey v. State,* ___ Md. ___, ___ A.2d ___ (No. 9, September Term, 1975, filed January 9, 1976) is not applicable thereto.

Appellant's argument concerning the sufficiency of the evidence is founded upon the First Amendment to the Constitution as well as Art. 40 of the Maryland Declaration of Rights. Appellant strenuously argues that his freedom of speech has been abridged.

The evidence in this case shows that the appellant was a patron in the Galley Restaurant in Lexington Park, Maryland. Trooper George W. Taylor of the Maryland State Police entered the restaurant for the purpose of meeting a complainant as well as having breakfast. The restaurant was crowded. The trooper took a seat at a table approximately eight feet from where the appellant and three other persons were seated in a booth. The restaurant was fairly noisy. Taylor heard appellant exclaim ". . . in a moderate to above normal tone . . ." That, "'. . . all the goddamn policemen in this County are no fucking good, they're

just after me.'" Taylor said that he felt that the remark was directed toward him, but he let the matter pass. "After two, three, four minutes of this above-normal tone he [appellant] began talking louder and it was at the point of yelling, and he not only was at this time talking about the GD policemen and picking on him and beatin' up on him, so forth, he started talking about ['Ithe fucking niggers in this County are no better than goddamn policemen[']". Appellant acknowledged that he made a comment about police officers which included the profanity described by Taylor, but he denied making the racial slur.

Taylor told the jury that approximately ten (10) percent of the patrons were black. He stated that two young black women were seated ". . . at the counter which was across from his [appellant's] booth approximately four feet away." When the racial slur allegedly was uttered by appellant, Taylor went over to the booth in which appellant was seated and ". . . advised Mr. Downs [appellant] that he would have to refrain from the profanity and tone down his tone of speaking, that it was disruptive. . . ." Appellant purportedly replied, "'Well, who in the fuck said anything to you, anyway? You're not in this goddamn conversation.'" Taylor warned that if appellant did not "'. . . refrain from . . . yelling and . . . [using] profane language . . .'" he would be placed under arrest. Appellant informed the trooper that, "'You ain't bad enough to place me under arrest.'" Appellant was wrong. He was placed under arrest by the trooper. When the trooper grabbed appellant by the arm the appellant, according to the trooper, ". . . broke loose . . . and struck . . . [the trooper] across the arm and left part of . . . [his] chest." A struggle ensued with the trooper eventually prevailing.

We note that at the time of arrest and at the time of trial appellant was carrying what he apparently believed to be a "license for police baiting." Appellant, at the trial, produced a page from an unidentified publication in which the following was reported:

> "LAW AND ORDER
>
> You can call your local cop a MOTHER (fornication expletive deleted) PIG or any other name and

> there is NOT A THING he can do to you LEGALLY, not even tell you to shut up. . . . The U.S. Supreme Court he said so INDIRECTLY by refusing to back Arkansas in a recent COP BADMOUTH case. . . ."

Perhaps appellant would have exercised more discretion had he been mindful of an old folk saying that, "It ain't the things you don't know what gets you into trouble; it's the things you know for sure what ain't so." *Best Quotations for All Occasions* 126 (L. Henry 1948).

Appellant was tried in the circuit court on a Statement of Charges,[2] after praying, at the District Court, a jury trial.

Md. Ann. Code art. 27, § 123(c) provides:

> "No person shall act in a disorderly manner to the disturbance of the public peace, upon any public street, highway, . . . place of public worship, . . . or amusement in any city, town or county of this State or in any store during business hours. . . ."[3]

Appellant asserts that in order to be punishable, the words that he used in his conversation with the two women and a man that were seated in the booth with him, must be either "obscene" or "fighting words." *Reese v. State,* 17 Md. App. 73, 299 A.2d 848 (1973). There was within this record no evidence that the objectionable language was erotic or produced "psychic stimulation." *Reese,* 17 Md. App. at 80-81, citing *Cohen v. California,* 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).[4] To be obscene in the Constitutional sense, the words employed must conjure up in the mind of those confronted with the words of the expression some

[2] Md. Rule 725

[3] The statute provides penalties of a fine of not more than $50, or confinement in jail for not more than sixty (60) days or both.

[4] *Cohen* was another five to four decision. The late Mr. Justice Harlan authored the majority opinion and was joined therein by Justices Douglas, Brennan, Stewart, and Marshall. Mr. Justice Blackmun dissented; the Chief Justice and the late Mr. Justice Black joined the dissent. Mr. Justice White joined the dissent in part. Two of the majority and one of the minority are no longer on the Court.

erotic psychic stimulation. *Reese v. State supra; Matter of Nawrocki,* 15 Md. App. 252, 260, 289 A.2d 846, 851 (1972). *See also Cohen v. California, supra.* Consequently, we must determine whether the epithets hurled by appellant fall within the definition of *"fighting words."* If they do not, then appellant has not violated the provisions of the Maryland "Disorderly Conduct" statute. *Reese v. State, supra.*

Mr. Justice Murphy, writing for a unanimous Court in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) defined "fighting words" as ". . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. at 572. We infer that by the use of the phrase "inflict injury" the Court was speaking of injury to the psyche, the ego, the id, the emotions. The Court, in *Chaplinsky,* implicitly branded as incorrect the old English cliche, "That sticks and stones will break my bones but words can never harm me."

The First Amendment proviso relative to "freedom of speech" was never intended by our founding fathers to license any and all use of profane language under any and all circumstances. "Speech is not an absolute, above the beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undersirable as to warrant criminal sanction." *Dennis v. United States,* 341 U.S. 494, 508, 71 S. Ct. 857, 866, 95 L. Ed. 1137, 1152 (1951) (C.J. Vinson). Stated another way, free speech is not an absolute, unemcumbered by any responsibility on the part of the speaker. Mr. Justice Holmes in *Schenck v. United States,* 249 U.S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470, 473 (1919) made clear that free speech carries with it some concomitant duty, when he wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that . . . [the legislature] has a right to prevent. It is a question of proximity and degree."

While the appellant admitted using ". . . a word from that [the above quoted article]", he denied that he was referring to Trooper Taylor. We think, however, that a rational inference may be drawn from the appellant's possession of the article and his acknowledgement that he used a word therefrom in his disparaging "anti-police" comment made in a loud voice, that appellant was, in fact, goading the trooper.

The courts have differed as to whether pejorative remarks similar to those voiced by appellant constitute "fighting words",[5] but we need not and do not decide in this case that question because the trooper's testimony that the disdainful comment "'. . . the goddamn police in this County are no fucking good . . .'" merely "caused" the officer ". . . to turn and look towards him [appellant]." Patently, Trooper Taylor was not aroused by the derisive epithet and, apparently, having been trained to resist provocation, he elected not to respond to the appellant's self-proclaimed ignorance.

We turn now to a discussion of the second comment passed by appellant, the remark which led to his being initially admonished by the trooper and within seconds thereafter arrested for disorderly conduct.

It has often been said that, "A little knowledge is a dangerous thing." Appellant has unwittingly proven, in this case, the wisdom of that maxim. The Supreme Court case to which the above quoted article alludes is not named or cited in the article nor has either the appellant or the State referred to it in their respective briefs. Our research, however, leads us to believe that the case which is unidentified in the article is *Lucas v. State,* 254 Ark. 584, 494 S.W.2d 705 (1973) which the Supreme Court, by order, without an accompanying

[5] *See* Annot., 34 A.L.R. 566 (1925) (Opprobrious words addressed to policeman as breach of peace). Remarks were deemed to constitute "fighting words" or disorderly conduct in Landry v. Daley, 288 F. Supp. 183 (N.D. Ill. 1968); Whited v. State, 256 Ind. App. 386, 269 N.E.2d 149 (1971); City v. Morris, 258 Minn. 467, 104 N.W.2d 902 (1960). *Contra* Oratowski v. Civil Service Comm'n, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1954); City v. Guidotti, 81 Ohio L. Abs. 33, 160 N.E.2d 355 (1958); Lane v. Collins, 29 Wis. 2d 66, 138 N.W.2d 264 (1965).

opinion, *Lucas v. Arkansas*, 416 U.S. 919 (1974)[6], vacated and remanded " . . . for further consideration in the light of *Lewis v. City of New Orleans*, 415 U.S. 130 (1974)." We do not know what happened as a result of the remand, but the Supreme Court in *Lucas* merely vacated the judgment; it did not reverse it. Reliance upon such a slender reed for a course of conduct that appears to be calculated to bring about a confrontation with a police officer is, at the very least, foolhardy.

In any event, neither *Lucas* nor *Lewis* laid down a new set of guidelines nor did either differ from *Chaplinsky*. *Lewis* held a New Orleans City ordinance proscribing the use of "opprobrious language" as being overly broad and outside the scope of *Chaplinsy's* definition of "fighting words." *Lucas* was remanded in order for the Arkansas court to determine whether that State's statutory language was without the ambit of *Lewis*. Both *Lucas* and *Lewis* were concerned with language used toward police officers. Neither addressed itself to a situation akin to that now before us.

The question that we must answer is: Are the words "[']. . . the fucking niggers in this County are no better than goddamn policemen[']" considered "fighting words" within the meaning of *Chaplinsky*? We have previously indicated in *Reese v. State, supra*, that " . . . derisive and annoying words would be 'fighting words' only when they have the characteristic of plainly tending to excite the addressee to a breach of the peace." 17 Md. App. at 82. The coarse, vulgar remarks passed by appellant in a loud, "yelling" type of voice, under the circumstances of this case, we think, entitled the trier of fact to infer that the strong racial slur "inflicted injury" and "tend[ed] to incite an immediate breach of the peace." We do not believe that the State must demonstrate that a riot or fight was on the verge of occurring, and, but for the officer's intervention, would have happened. In our view, it is enough for the State to show the words used were such that men of common intelligence would understand that such words would so arouse emotion that the average person or

[6] Mr. Justice Blackmun filed a vigorous dissent. He was joined therein by the Chief Justice and Mr. Justice Rehnquist. The text of the dissent is reported in 416 U.S. 919-922.

persons to whom they were addressed, directly or indirectly at the time spoken, would be stirred to the point of violent eruption or fighting.

We hold that the expression "[']the fucking niggers in this County are no better than goddamn policemen[']" spoken in a loud voice or "yelled" in a restaurant filled with a racially mixed crowd were "fighting words" falling within the definition of that term, as it is used in *Chaplinsky*. We observe no error on the part of Judge Mattingly in refusing to grant a judgment of acquittal at the close of the evidence inasmuch as there was sufficient evidence of a violation of the Disorderly Conduct statute to take the matter to the jury.

Appellant does not assert any contention that the evidence was legally insufficient to sustain the assault and resisting arrest convictions. He is seemingly content to ground his attack on the circuit court's judgment along the Constitutional lines previously discussed. Appellant obviously feels that if his conviction for disorderly conduct fell, the arrest would of necessity be invalid and his subsequent conduct would be lawful. *Midgett v. State*, 216 Md. 26, 139 A.2d 209 (1958). Appellant, however, has not prevailed. The arrest and conviction for disorderly conduct are proper, and, hence, the assault and resisting arrest convictions, it follows, will be affirmed.

Convictions affirmed. Sentences vacated and case remanded for the imposition of proper sentences.

APPENDIX B

In The Court of Appeals of Maryland

No. 27

September Term, 1976

John Edward Downs
v.
State of Maryland

Murphy, C.J., Singley, Smith, Digges, Levine and Eldridge, JJ.

(Filed November 30, 1976)

MURPHY, C.J.

We granted certiorari to consider whether, in the circumstances of this case, certain vulgar language constituted "fighting" words within the sense contemplated by *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), and its progeny, and were therefore outside of the protection of the First Amendment.

Appellant Downs was conversing with three friends while eating an early morning breakfast in a Lexington Park restaurant. In the course of the conversation Downs said in a loud voice, "All the goddamn policemen in this County are no fucking good, they're just after me." A few minutes later he loudly said, "[T]he fucking niggers in this County are no better than goddamn policemen." A uniformed State Trooper

(Trooper Taylor) sitting at a table about eight feet away from the booth in which Downs and his friends were seated overheard these remarks.

The trooper went over to Downs' booth and told him that his talk was disruptive and that he would be placed under arrest if he did not refrain from using such profane language. Downs replied, "You ain't bad enough to place me under arrest," whereupon the trooper grabbed him and informed him that he was under arrest for disorderly conduct. A scuffle ensued, but Taylor finally managed to handcuff Downs.

Downs was charged with disorderly conduct in violation of Maryland Code (1957, 1976 Repl. Vol.) Art. 27, § 123(c),[1] resisting arrest, and assault and battery. At his trial before a jury in the Circuit Court for St. Mary's County, it was established that the restaurant was crowded, busy, and noisy. All but three or four of the 20 stools at the counter were occupied, as well as all the tables and booths. Approximately 35 to 45 persons were in the restaurant; three or four were black. Two black women were sitting at the counter about four feet from the booth in which Downs and his friends were sitting. Downs had a newspaper article in his possession; it said:

> "You can call your local cop a MOTHER (fornication expletive deleted) PIG or any other name and there is NOT A THING he can do to you LEGALLY, not even tell you to shut up. . . . The U.S. Supreme Court has said so INDIRECTLY by refusing to back Arkansas in a recent COP BADMOUTH case. . . ."

Trooper Taylor testified that he could hear Downs' remarks as distinct from the general noise level of the restaurant. He was not personally aroused by the reference to police officers but was concerned only about the provocativeness of the racial remarks in the racially mixed crowd. Two of Downs' friends who were

[1] Section 123(c) provides, in pertinent part:

"(c) No person shall act in a disorderly manner to the disturbance of the public peace . . . at any place of . . . public resort or amusement . . . or in any store during business hours . . . in any city, town or county of this State."

seated with him during the incident testified; both said that the remarks were not directed to anyone in particular but were merely part of the general conversation between Downs and themselves. One of the cooks and a patron of the restaurant testified; neither could distinguish Downs' remarks from the general din. Downs himself said that his remarks were not directed to anyone in particular.

The jury found Downs guilty on all three charges. His original sentence of sixty days on the disorderly conduct charge and concurrent three-year sentences on the resisting arrest and assault and battery charges were modified by a sentence review panel to suspended sentences and indeterminate probation. The Court of Special Appeals affirmed the convictions but vacated the indeterminate probation because it was not in accord with Code, Art. 27, § 641A. *Downs v. State,* 30 Md. App. 253, 351 A.2d 166 (1976).

The Court of Special Appeals did not consider whether the remarks about police officers constituted "fighting" words because the State Trooper was not offended or angered by them. It considered the remark about blacks and found that "the strong racial slur" amounted to "fighting" words because the trier of fact could have inferred from the volume of Downs' voice and from the racial composition of the crowd that the comment " 'inflicted injury' " and " 'tend[ed] to incite an immediate breach of the peace.' " 30 Md. App. at 261, 351 A.2d at 171. The court found it unnecessary for the State to prove that a fight or a riot was imminent. All that it need show was that "the average person or persons to whom [the words] were addressed, directly or indirectly at the time spoken, would be stirred to the point of violent eruption or fighting." *Id.* at 262, 351 A.2d at 171.

The doctrine of "fighting" words was originated by the Supreme Court in 1942 in *Chaplinsky v. New Hampshire, supra.* Chaplinsky was distributing religious literature, and the City Marshall had received complaints about it. After being twice warned of the complaints by the marshal, Chaplinsky said to him, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are

Fascists or agents of Fascists." He was found guilty of violating a statute which prohibited ". . . address[ing] any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, [or] call[ing] him by any offensive or derisive name . . . ."

In a now classic passage, the Court said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. at 571-72, 62 S. Ct. at 769, 86 L. Ed. at 1035.

The Court adopted the construction of the statute by the highest court of New Hampshire which had limited its application to words having " 'a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.' " 315 U.S. at 573, 62 S. Ct. at 770, 86 L. Ed. at 1036, quoting *State v. Brown,* 68 N.H. 200, 38 A. 731 (1895); *State v. McConnell,* 70 N.H. 294, 47 A. 267 (1900). According to the New Hampshire court, the statute prohibited " '. . . face-to-face words plainly likely to cause a breach of the peace by the addressee . . . .' " *Id.* at 573, 62 S. Ct. at 770, 86 L. Ed. at 1036. " 'The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.' " *Id.* Noting that the terms " 'damned racketeer' " and " 'damned Fascist' " are "likely to provoke the average person to retaliation," *Id.* at 574, 62 S. Ct. at 770, 86 L. Ed. at 1036, the Supreme Court affirmed Chaplinsky's conviction.

Although Chaplinsky makes it clear that "fighting" words are outside of the protection of the Constitution, it was not made clear in that case whether the words

must be directly addressed to someone who is either injured thereby or incited to a breach of the peace. The New Hampshire construction adopted by the Supreme Court referred, somewhat inconsistently, to the individual to whom a remark is addressed and to the average addressee. In Chaplinsky, the words were addressed to a particular individual, but there was no evidence that the marshal was either injured or incited. The Supreme Court was satisfied that an "average" person would be provoked to retaliate.

Later cases have resolved this ambiguity and make it clear that the only speech which can be punished, in this context, is that which has " 'a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.' " *Gooding v. Wilson,* 405 U.S. 518, 524, 92 S. Ct. 1103, 1107, 31 L. Ed. 2d 408, 415 (1972), quoting *Chaplinsky.* In effect, "fighting" words have been recognized as having some social value and are punishable now not on a "per se" basis but only when there is a likelihood of imminent disturbance.

The first limitation on the "fighting" words doctrine occurred in *Cohen v. California,* 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1970), where the Court reversed Cohen's conviction for "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct" by wearing into the Los Angeles Courthouse a jacket bearing the words "Fuck the Draft." The Court described "fighting" words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." 403 U.S. at 20, 91 S. Ct. at 1785, 29 L. Ed. 2d at 291. It assumed that the words must be "directed to the person of the hearer." *Id.* The slogan on Cohen's jacket did not fall into that category because it was not directed to anyone in particular and there was no evidence that anyone who saw it was aroused. The Court went on to defend Cohen's use of the admittedly vulgar word "fuck." It refused to allow the State the right "to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us" because it concluded that "one man's vulgarity is another's lyric." 403 U.S. at 25, 91 S. Ct. at 1788, 29 L.

Ed. 2d at 294. By these words, the Supreme Court has made it difficult to find any curse words *inherently* provocative.

The second limitation occurred two years later in *Gooding v. Wilson, supra.* During an anti-war protest, Wilson said to police officers attempting to move him from the door of a military building, "White son of a bitch, I'll kill you." You son of a bitch, I'll choke you to death." "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." He was convicted under a Georgia statute which provided: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." Because the Georgia appellate courts had not limited the application of the statute to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed," 405 U.S. at 524, 92 S. Ct. at 1103, 31 L. Ed. 2d at 408, the Supreme Court found the statute unconstitutional on its face. The *Chaplinsky* element of merely "inflicting injury" was not mentioned. The new test appears to require the likelihood that ". . . the person addressed would make an immediate violent response." *Id.* at 528, 92 S. Ct. at 1109, 31 L. Ed. 2d at 417. Thus, while affirming the proposition that "fighting" words are punishable under a narrowly drawn statute, the Court so limited the application of the original doctrine that Mr. Justice Blackmun, in dissent, said that the Court "is merely paying lip service to *Chaplinsky.*" *Id.* at 537, 92 S. Ct. at 1113, 31 L. Ed. 2d at 422.

The Court has dealt in a summary fashion with "fighting" words cases arising since *Gooding.* In *Rosenfeld v. New Jersey,* 408 U.S. 901, 92 S. Ct. 2479, 33 L. Ed. 2d 321 (1972) (mem.), it vacated and remanded without opinion in light of *Cohen* and *Gooding* a conviction for disorderly conduct under a statute prohibiting "loud and offensive or profane or indecent language in any . . . public place . . . ." The defendant had used the term "mother fucker" several times at a public school board meeting. Mr. Justice Powell, in dissent, recognized that the defendant's words were not

directed to a specific individual and that physical violence on the part of the audience was unlikely. His argument that the words could have offended the sensibility of the audience was unheeded by the majority. In *Brown v. Oklahoma,* 408 U.S. 914, 92 S. Ct. 2507, 33 L. Ed. 2d 326 (1972) (mem.), the Supreme Court vacated and remanded in light of *Cohen* and *Gooding* a conviction under a statute prohibiting obscene or lascivious language in a public place or in the presence of females. During a meeting at which no police officers were present, Brown had referred to police officers in general and to one in particular as "mother fucking Fascist pigs." In *Lewis v. City of New Orleans,* 408 U.S. 913, 92 S. Ct. 2499, 33 L. Ed. 2d 321 (1972) (mem.), the Court vacated and remanded in light of *Gooding* a conviction under a statute prohibiting cursing, reviling, or using obscene or opprobrious language to a police officer while in the performance of his duties. Lewis had called the police officers "God damned mother fuckers." Mr. Justice Powell, concurring, would have considered the words to be "fighting" words had they been addressed face to face in a hostile manner to someone other than a police officer, trained to exercise restraint.

Upon remand to the Louisiana Supreme Court, Mrs. Lewis' conviction was affirmed. 263 La. 809, 269 So. 2d 450 (1972). The United States Supreme Court, finding the statute facially invalid, reversed and remanded. 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974). Four more cases followed in quick succession, all involving the constitutionality of statutes prohibiting loud, profane, insulting, lewd or boisterous words. By memorandum decisions, the Court vacated the judgment in each case and remanded in light of the second *Lewis* decision. *Lucas v. Arkansas,* 416 U.S. 919, 94 S. Ct. 1917, 40 L. Ed. 2d 277 (1974);[2] *Kelly v. Ohio,* 416 U.S. 923, 94 S. Ct. 1922, 40 L. Ed. 2d 280 (1974); *Rosen v. California,* 416 U.S. 924, 94 S. Ct. 1922, 40 L. Ed. 2d 280

[2] On remand, the state court conviction was affirmed, 520 S.W.2d 224 (Ark. 1975). The Supreme Court dismissed the appeal for want of a substantial federal question. 423 U.S. 807, 96 S. Ct. 17, 46 L. Ed. 2d 28 (1975).

(1974); *Karlan v. City of Cincinnati,* 416 U.S. 924, 94 S. Ct. 1922, 40 L. Ed. 2d 280 (1974).[3]

Having traced the development of the "fighting" words doctrine, we now apply it to the facts in this case. We need not consider whether Downs' first remark, "All the goddamn policemen in this County are no fucking good, they're just after me," constituted "fighting" words because the state trooper, a possible addressee, was not aroused by the comment. We need only examine his second remark, "[T]he fucking niggers in this County are no better than goddamn policemen." Since *Cohen v. California, supra,* apparently teaches that the use of the adjective "fucking" is not punishable in the absence of compelling reasons, the potentially punishable words are "[T]he niggers in this County are no better than goddamn policemen." This remark was made by Downs during a conversation with friends. There was no direct evidence that it was spoken to anyone other than the persons sitting in the booth with Downs. Even if there were, no evidence was adduced that anyone else, beside Trooper Taylor, heard this statement. Even if someone else did, there was no evidence that he or she was offended by it. And, even if someone were offended by it, there was no evidence that any person was so aroused as to respond in a violent manner. Thus, Downs' remarks were not the kind of personally abusive epithets which fall outside of the protection of the First Amendment under the rubric of "fighting" words. He engaged in protected speech. That his views might be offensive to someone who overheard him does not warrant a conviction for disorderly conduct. *Bachellar v. Maryland,* 397 U.S. 564, 90 S. Ct. 1312, 25 L. Ed. 2d 570 (1970). Accordingly, we hold that the trial judge erred in not granting Downs' motion for judgment of acquittal on the disorderly conduct charge, and that conviction must be reversed.

Judgment of the Court of Special Appeals affirming the conviction for disorderly conduct reversed; case remanded to that Court with instructions to remand it to the Circuit Court for St. Mary's County for a new trial; costs to be paid by the County Commissioners of St. Mary's County.

[3] On remand, Karlan's conviction was affirmed. 39 Ohio St. 2d 107, 314 N.E.2d 162 (1974). The Supreme Court denied cert., 419 U.S. 1056, 95 S. Ct. 640, 42 L. Ed 2d 654 (1974).